

Explanatory Statement

Issued by the Authority of the Minister for Foreign Affairs

Charter of the United Nations Act 1945

Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2018 (No. 2)

The purpose of the *Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2018 (No. 2)* (the Amendment Declaration) is to make a consequential amendment to the *Charter of the United Nations (UN Sanction Enforcement Law) Declaration 2008* to reflect the making of the *Charter of the United Nations (Sanctions – Mali) Regulations 2018* (the Regulations).

Subsections 27(1) and (5) of the *Charter of the United Nations Act 1945* (the Act) provide respectively that individuals and bodies corporate commit an offence if they engage in conduct that contravenes a UN sanction enforcement law. The term ‘UN sanction enforcement law’ is defined in section 2 of the Act to mean a provision that is specified in an instrument under subsection 2B(1) of the Act. Section 2B provides that the Minister may, by legislative instrument, specify a provision of a law of the Commonwealth to be a UN sanction enforcement law to the extent that the provision gives effect to decisions that the United Nations Security Council has made under Chapter VII of the *Charter of the United Nations* (Charter), which Australia is required to carry out pursuant to Article 25 of the Charter.

The Amendment Declaration gives effect to certain provisions of United Nations Security Council Resolution (UNSCR) 2374 (2017), which Australia is required to implement pursuant to Article 25 of the Charter. By Item 1 of Schedule 1 of the Amendment Declaration, the Minister substituted the existing Schedule 1 of the *Charter of the United Nations (UN Sanction Enforcement Law) Declaration 2008* with a replacement Schedule 1. The replacement Schedule 1 specifies the provisions of Commonwealth laws that are UN sanction enforcement laws pursuant to subsection 2B(1) of the Act for the purposes of section 27 and related provisions of the Act. The substituted Schedule includes references to all of the provisions of the Regulations that are declared to be UN sanction enforcement laws. In particular, it adds references to sections 5 and 6 of the *Regulations*.

Section 5 prohibits a person from directly or indirectly making an asset available to, or for the benefit of, a designated person or entity, unless authorised by a permit under regulation 8.

Section 6 prohibits a person who holds a controlled asset from using or dealing with the asset, allowing the asset to be used or dealt with, or facilitating the use of, or the dealing with, the asset, unless authorised by a permit under section 8.

No public consultation was undertaken under section 17 of the *Legislation Act 2003* before this instrument was made as it represents a minor amendment. In addition, the instrument implements Australia’s international legal obligations arising from a decision of the United Nations Security Council.

The Amendment Declaration is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* as set out in Attachment A.

Authority: Section 6 of the
*Charter of the United
Nations Act 1945*

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

*Charter of the United Nations (UN Sanction Enforcement Law) Amendment
Declaration 2018 (No. 2)*

The *Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2018 (No. 2)* (the Amendment Declaration) is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

The Amendment Declaration amends Schedule 1 of the *Charter of the United Nations (UN Sanction Enforcement Law) Declaration 2008* to add sections 5 and 6 of the *Charter of the United Nations (Sanctions – Mali) Regulations 2018* (the Regulations). This has the effect that sections 5 and 6 are declared as ‘UN sanction enforcement laws’, meaning that contravening these prohibitions may, pursuant to section 27 of the *Charter of the United Nations Act 1945*, result in a penalty of imprisonment.

Human rights compatibility

The Amendment Declaration ensures that persons and entities who act in a way that threatens the peace, security or stability of Mali will be subject to UNSC sanctions measures.

The Parliamentary Joint Committee on Human Rights (Committee) has accepted that the use of sanctions to apply pressure to regimes and individuals in order to end the repression of human rights may be regarded as a legitimate objective for the purposes of international human rights law. It has also expressed concern that Australia’s sanctions regimes may not be proportionate to their stated objective.

The human rights compatibility of the Regulations is addressed by reference to each of the human rights engaged below.

Right to a fair hearing and liberty

Article 14(1) of the ICCPR protects the right to a fair trial and a fair hearing. The right concerns procedural fairness, and applies where rights and obligations, such as personal property and other private rights, are to be determined.

Article 9 of the ICCPR protects the right to liberty, including the right not to be arbitrarily detained. The notion of arbitrariness incorporates elements of inappropriateness, injustice and lack of predictability.

Report

In the context of Australia's autonomous sanctions regime, the Committee has taken the view that the relevant regulations engage Article 14 insofar as they limit the avenues available to challenge the designation or declaration of a person for targeted financial sanctions and travel bans. The Committee noted that the process for making designations and declarations limits the right to a fair hearing because it does not provide for merits review.

The Committee has previously expressed the view that Regulations which are specified as 'UN sanction enforcement laws' under the *Charter of the United Nations (UN Sanction Enforcement Law) Declaration 2008* (the Declaration) may engage and limit the right to liberty, because they may result in a penalty of imprisonment for a person. The Committee has expressed concern that the definition of UN sanction enforcement laws lacks sufficient certainty and could, in certain circumstances, result in arbitrary detention.

Permissible limitations

The Government's position is that any limitation on the access to merits review is justified. The Regulations have the legitimate objective of responding to actions and policies arising in Mali which threaten Mali's peace, security, and stability, and demonstrating the international community's condemnation of the people involved. The limitation on access to merits review in this context is reasonable as it reflects the seriousness of the international peace and security and foreign policy considerations involved.

Further, while merits review is unavailable for a UNSC decision to designate a person for the purposes of the Regulations, there are clear procedures for requesting the revocation of designations, and judicial review is available under the *Administrative Decisions (Judicial Review) Act 1976* (the ADJR Act).

The Regulations also engage Article 14 through the application of strict liability in certain circumstances. The Regulations provide in subsections 5(2) and 6(2) that strict liability applies to the circumstance that the making available of an asset or the use of, or dealing with, a controlled asset is not authorised by a permit under section 8. In effect, the strict liability does not apply to any other element of the offence. The purpose of this provision is to prevent a spurious defence that a statement of the Minister could be taken as *de facto* authorisation to engage in conduct that is prohibited under the *Charter of the United Nations Act 1945*; either the permit exists or it does not.

The position of the Government is that the Regulations are consistent with Article 14 as the strict liability is reasonably targeted to achieve the legitimate purpose of preventing a spurious defence that a statement of the Minister could be taken as *de facto* authorisation to engage in conduct that is prohibited under the *Charter of the United Nations Act 1945*, in addition to the overarching objectives of the Mali sanctions regime.

Sections 5 and 6 of the *Regulations* will be declared as ‘UN sanction enforcement laws’ under the Declaration, meaning that contravening these prohibitions may, pursuant to section 27 of the Act, result in a penalty of imprisonment and engage the right to liberty.

The Government considers that any limitation on human rights that may arise as a consequence of the inclusion of sections 5 and 6 of the Regulations in the *Charter of the United Nations (UN Sanction Enforcement Law) Declaration 2008* is permissible and consistent with Australia’s obligations under international human rights law. The new prohibitions in sections 5 and 6 of the Regulations use clear language and terms. The Regulations define the phrases ‘designated person or entity’ and ‘controlled asset’ to delineate the application of the prohibitions and to ensure the prohibitions can be readily understood. The Regulations have the legitimate aim of responding to actions and policies that threaten the peace, security, and stability of Mali, and demonstrating the international community’s condemnation of such actions and policies.

The position of the Government is that the prohibitions in sections 5 and 6 are a reasonable, necessary and proportionate means of achieving the legitimate objective of the Regulations, and implementing a binding decision of the UNSC.